Filed 6/21/19 P. v. McMahel CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SARAH DANEILLE MCMAHEL,<br><br>Defendant and Appellant. | C086897<br><br>(Super. Ct. Nos. P17CRF0481, P16CRF0058, P15CRF0139) |

Defendant Sarah Daneille McMahel appeals a judgment entered after a jury found her guilty of unlawful driving or taking a vehicle with a prior conviction. (Veh. Code, § 10851, subd. (e).)[1] She argues her conviction must be reversed because it is possible the jury utilized an incorrect legal theory to convict her. She also requests correction of the amended abstract of judgment to reflect the true amount of the trial court's previous

[1] Undesignated statutory references are to the Vehicle Code.

correction of custody credits. We conclude any instructional error was harmless beyond a reasonable doubt and order the correction of the amended abstract. The judgment is affirmed.

## FACTUAL AND PROCEDURAL HISTORY

We limit our description to that necessary to the determination of defendant's issues on appeal.

W.G. testified to working on a Lexus in the work area behind his shop. The car needed a new radiator, so he replaced it. W.G. left the car running on a car jack with the hood up to attend another customer who had arrived. W.G. returned no more than five minutes later, and the car was gone.[2] He spoke with his daughter's friend, who told him the car " 'went up the hill.' " W.G. went up the hill, but did not find the car. He returned and called authorities to report the theft. W.G. saw defendant walking down the hill between 30 minutes and 45 minutes after the car was taken.

Eleven-year-old T.P. testified she was waiting for her brother when she saw a woman walk up to a running car at the radiator shop. The woman put the hood down, removed the jack, and drove the car up the hill. The woman had brown hair and was wearing a blue or green hat, sunglasses, leggings, and a flannel jacket. T.P. told her uncle and W.G. what she had seen. T.P. later saw a woman walk down the hill that looked similar to the woman T.P. had seen take the car, but she could not tell whether it was the same woman as she was no longer wearing the hat, sunglasses, and jacket. T.P. told the investigating officer she was not the person who took the car, but later changed her mind. T.P. did not recognize anyone in the courtroom.

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[2] The car's owner confirmed he had left the Lexus with W.G. and had not given anyone permission to take it.

J.R. testified he and defendant were dropped off near a thrift store, and he walked to pick up some drugs from a friend while defendant waited. He was trying to ditch her, "[b]ecause drugs are more important." J.R. denied seeing defendant near the mechanic shop or that he saw her steal the car. J.R. did not remember telling authorities he saw defendant shut the hood on the Lexus and drive the car up the hill past him. Nonetheless, J.R. told the officer the Lexus "was somewhere along the road."

Officer Andrew Litzius testified to speaking with J.R., who told him, "[h]e saw [defendant] shut the hood on the car, get in the driver's seat, and drive up Stone Lane." This was consistent with what T.P. told him she had witnessed. Officer Litzius found the car down a dirt path in a wooded area not visible from the street. It was locked.

Officer Luke Gadow testified to detaining defendant on the day in question. She was wearing black pants and a plaid shirt. There were burrs on the bottom of her pant legs that were consistent with her having walked through vegetation in the area. Officer Gadow did not observe the vegetation where the car was recovered. The parties stipulated the value of the Lexus was more than $950.

The closing arguments focused on whether the People had established defendant was the woman who unlawfully took or drove the Lexus. The People argued there was no dispute that someone took the Lexus. Further, the People had established there was an "intent to deprive the owner of possession or ownership . . . for any period of time" because "the owners did not give permission," and the car "was left in an area that was hidden from the roadway." Thus, the People argued, the only real question was whether it was established that defendant was the person who took the car. Defense counsel concurred that the trial was about whether his client committed the crime, stating: "It's not about whether or not a car was stolen[,] but who did it."

The jury found defendant guilty of violation of section 10851, subdivision (e), as charged in count one and determined the value of the car was more than $950.

DISCUSSION

**I**

***The Jury Instructions***

Defendant contends her conviction must be reversed because it is possible the jury utilized an incorrect legal theory. Specifically, she argues the trial court erred in not instructing on the specific intent required to sustain her conviction under section 10851, on a theory of *theft*, and thus, she may have been convicted of theft without the jury making the necessary specific intent determination. We decline to decide whether the trial court's failure to instruct the jury on the specific intent to permanently deprive the owner of the Lexus was error because any such error was harmless beyond a reasonable doubt.

***The Jury Instructions Given***

The trial court instructed the jury in pertinent part: "The People must not only prove the Defendant did the act charged, but also that she acted with a particular intent or mental state. The instruction for the crime explains the intent or mental state required." "The crime charged in this case requires proof of union or joint operation of act and wrongful intent. [¶] For you to find a person guilty of the crime of unlawful taking or driving of a vehicle as charged in Count 1, that person must not only intentionally commit the prohibited act but must do so with specific intent and/or mental state. [¶] The act and intent or mental state required are explained in the instructions for that crime." "The Defendant is charged in Count 1 with the unlawful taking or driving of a vehicle in violation of . . . Section 10851. [¶] To prove the Defendant is guilty of this crime, the People must prove that: 1. The Defendant took or drove someone else's

vehicle without the owner's consent; And [¶] 2. When the Defendant did so, she intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] A taking requires the vehicle be moved for any distance no matter how small. And a vehicle includes a passenger vehicle. [¶] If you conclude that the Defendant committed a vehicle theft, you must determine whether the vehicle was worth more than $950."

***The Law***

*People v. Gutierrez* (2018) 20 Cal.App.5th 847 (*Gutierrez*) is instructive to understanding the different ways section 10851 may be violated and implications arising therefrom. It explained: "Section 10851, subdivision (a), provides, 'Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle . . . is guilty of a public offense . . . .' By its terms, section 10851 is a 'wobbler' offense that may be punished as either a felony or a misdemeanor. (See § 10851, subd. (a); *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974, fn. 4 [listing § 10851, subd. (a), as a statute that provides for 'alternative felony or misdemeanor punishment'].)

"As the Supreme Court has observed, section 10851, subdivision (a), ' "proscribes a wide range of conduct." ' (*People v. Garza* (2005) 35 Cal.4th 866, 876.) A person can violate section 10851 by '[u]nlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession.' (*Garza*, at p. 871.) Section 10851 can also be violated 'when the driving occurs or continues after the theft is complete' (referred to by the Supreme Court as 'posttheft driving') or by "driving [a vehicle] with the intent only to temporarily deprive its owner of possession (i.e. joyriding)." ' (*Garza*, at pp. 871, 876.)" (*Gutierrez*, *supra*, 20 Cal.App.5th at pp. 853-854.)

"Taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and a defendant convicted of violating section 10851 with such an intent has suffered a theft conviction. ([*People v.*] *Page* [(2017) 3 Cal.5th 1175] 1183, 1186–1187]; *People v. Garza*, *supra*, 35 Cal.4th at p. 871.) On the other hand, posttheft driving and joyriding are not forms of theft; and a conviction on one of these bases is not a theft conviction. (*Page*, at p. 1183 ['[r]egardless of whether the defendant drove or took the vehicle, he [or she] did not commit auto theft if he [or she] lacked the intent to steal']; *Garza*, at p. 871.)" (*Gutierrez, supra*, 20 Cal.App.5th at p. 854.)

"Following passage of Proposition 47 [(as approved by voters Gen. Elec., Nov. 4, 2014, eff. Nov. 5, 2014)], Courts of Appeal disagreed whether Penal Code section 490.2 applied to vehicle theft under . . . section 10851, that is, whether a theft conviction under section 10851 could continue to be punished as a felony regardless of the value of the vehicle or whether it must be punished as a misdemeanor if the vehicle's value did not exceed $950. The Supreme Court resolved the issue in *Page*, holding, 'By its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the . . . section 10851 offense.' (*Page*, *supra*, 3 Cal.5th at p. 1183.) Thus, after the passage of Proposition 47, 'obtaining an automobile worth $950 or less by theft constitutes petty theft under [Penal Code] section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged.' (*Page*, at p. 1187.)" (*Gutierrez*, *supra*, 20 Cal.App.5th at pp. 854-855.)

"As *Page* made clear, when a violation of section 10851 is 'based on theft,' a defendant can be convicted of a felony only if the vehicle was worth more than $950. (*Page*, *supra*, 3 Cal.5th at pp. 1187–1188.) It is also necessary to prove the vehicle was taken with an intent to permanently deprive the owner of its possession—'a taking with intent to steal the property.' (*Page*, at p. 1182.)" (*Gutierrez, supra*, 20 Cal.App.5th at

p. 856.) Thus, the *Gutierrez* court reasoned the instructions allowed the defendant to be convicted for stealing a car even though the value of that car was not proven. (*Id*. at p. 857.) This error required a reduction of the conviction to a misdemeanor and remand for the People to accept that reduction or retry the charge as a felony with correct instructions. (*Ibid*.)

Here, unlike the defendant in *Gutierrez*, the jury determined the car at issue was worth more than $950, making any theft of the car felonious and eliminating the Proposition 47 issue. (See *Gutierrez, supra*, 20 Cal.App.5th at pp. 856-857; *People v. Page* (2017) 3 Cal.5th 1175, 1187–1188 (*Page*).) Defendant nonetheless relies on *Gutierrez's* language faulting the trial court for not instructing on the essential element for a theft theory, to wit, that "the vehicle was taken with an intent to permanently deprive the owner of its possession." (*Gutierrez, supra*, 20 Cal.App.5th at p. 856.) She asserts, this failure prejudiced her requiring reversal.

We disagree. Assuming the trial court's failure to instruct on the specific intent required for a conviction on a theft theory was error, we conclude any such error was harmless beyond a reasonable doubt. (*People v. Chun* (2009) 45 Cal.4th 1172, 1201 [harmlessness of instructional error on elements of offenses must be established beyond a reasonable doubt].) This is so because " 'it [was] impossible, upon the evidence, to have found what the verdict *did* find without' " also making the findings necessary under a legally correct theory. (*Id.* at pp. 1204, 1205 [instructional error was harmless because given the evidence presented no juror could have found felony murder without also finding conscious-disregard-for-life malice].)

Here, the jury's verdict necessarily determined the elements essential to a conviction for joyriding, to wit, the unlawful taking of a car without the intent to permanently deprive the owner of it. (*Page*, *supra*, 3 Cal.5th at p. 1183.) The undisputed

evidence established that a woman approached the Lexus, took it off the jack, and drove it away. Whoever the woman was, she did not have permission to do so. Defense counsel's argument conceding the crime occurred underscores that the only disputed issue at trial was whether *defendant* was the woman who took the car. As such, having found defendant guilty on these facts, the jury necessarily determined defendant took the car intending to possess it for some period of time. This establishes a violation for joyriding. (§ 10851, subd. (a).) Accordingly, any alleged error in instructing the jury on the specific intent required to convict defendant on a theory of theft was harmless beyond a reasonable doubt.

**II**

***The Amended Abstract of Judgment***

Defendant requests this court to order correction of the amended abstract of judgment to reflect a correction of custody credits previously entered by the trial court. The People agree.

On October 25, 2018, the trial court corrected defendant's custody credits to reflect 316 days actual credit, 316 days conduct credit, and 442 days of credit on mandatory supervision for a total of 1,074 days of custody credit. The amended abstract erroneously lists 315 days actual credit and 316 days of conduct credit for a total of 442 days of custody credits. We concur with the parties that the amended abstract must be corrected (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical errors reflected in abstract of judgment]), and we will direct the trial court to correct the amended abstract of judgment to conform to the corrections previously made to defendant's custody credits.

## DISPOSITION

The trial court is directed to correct the amended abstract of judgment to conform to the correction of custody credits made on October 25, 2018. The court shall forward a certified copy of this corrected amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
KRAUSE, J.